OCT 29 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1954.

No. 430

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC. and INVESTORS DIVERSIFIED SERVICES, INC.,

Petitioners,

—against—

JAMES FOUNDATION OF NEW YORK, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

Subject Matter.

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	11
Conclusion	13
Appendix	14-39
Opinion of Court of Appeals	14
Questions by Court of Appeals	22
Opinion on Petition for Rehearing	24
Appendix to Foregoing Opinion	34

Cases Cited.

Chesapeake & Ohio Railway Purchase, 261 I. C. C. 239 (1945)	12
I. C. C. v. B. & O. R.R. Co., 152 I. C. C. 721 (1929)	12
Lehigh Valley R. Co., 271 I. C. C. 553 (1949)	12
Meyer v. Price, 250 N. Y. 370 (1929)	10
Rochester Tel. Corp. v. United States, 307 U. S. 125	6
Straight Side Basket Corp. v. Webster Basket Co., 82 F. 2d 245 (2d C. 1936)	10
U. S. v. Detroit & Cleveland Navigation Co., 326 U. S. 236 (1945)	11
U. S. v. Pierce Auto Freight Lines, Inc., 327 U. S. 515 (1946)	11
U. S. v. Yellow Cab. Co., 338 U. S. 338	13
Wabash Railroad Company Control, 252 I. C. C. 319 (1942)	12

Statutes, etc.

28 U. S. C. A., § 1254(1)	2
49 U. S. C. A.—I. C. C. Act § 5	3

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—against—

JAMES FOUNDATION OF NEW YORK, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on June 8, 1954 (R. p. 1109).

Citations to Opinions Below.

The opinion of the Judge of the District Court is reported in 115 Fed. Supp. 282 and is contained in the certified record from the Court below (fol. 17). The two opinions of the United States Court of Appeals for the Second Circuit (after argument and after application for rehearing) are reported in 214 F. 2d 446 and are contained in an appendix to the certified copy of the record from the Court below (R. pp. 1100, 1169).

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered June 8, 1954 and is contained in the appendix (R. p. 1109) to the certified record. A petition for a rehearing was duly filed June 23, 1954 pursuant to Rule XXVIII of the Court below. The said petition was acted upon by the United States Court of Appeals for the Second Circuit which filed on August 3, 1954 an opinion (R. pp. 1169-1180). On August 3, 1954 an order (R. p. 1181) was entered in the Court below, which denied the petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254(1). The jurisdiction of the District Court was based on diversity of citizenship.

Questions Presented.

1. Whether the Court of Appeals may adjudge, contrary to determinations and orders of the Interstate Commerce Commission for over thirty years, that a deposit of stock in a voting trust approved by the Interstate Commerce Commission does not prevent the beneficial owner from acquiring control of a carrier. The petitioners herein ask this Honorable Court to resolve this conflict between the determination and order of the Commission and the decision of the Court of Appeals.

2. Whether the Court of Appeals has departed from the accepted and usual course of judicial proceedings by making a finding of fact with respect to the intent of witnesses not made by the District Court, not asked by Respondent's counsel in the District Court or the Court of Appeals, not mentioned in Respondent's Brief in the Court of Appeals, not mentioned in the original opinion of the Court of Appeals, and contrary to uncontradicted sworn testimony of such witnesses.

Statute Involved.

The statutory provision involved is § 5 of the Interstate Commerce Act, 49 U. S. C. A., printed in the appendix hereto.

Statement.

The petitioners appealed to the United States Court of Appeals from a judgment (fol. 11) of the United States District Court for the Southern District of New York after a trial without a jury for specific performance of contracts for the sale in February 1951 by respondent to petitioners and their assignors of 153,165 shares of the common stock and 55,725 shares of the preferred stock of Western Pacific Railroad Company. The District Court found that the offer of sale was accepted (fol. 49) but dismissed the complaint on the merits because that Court found the offer was made without authority. The Court of Appeals affirmed the dismissal of the complaint but on new ground not passed on by the District Court, namely, that, assuming the contracts of purchase were made, their performance would violate § 5 of the Interstate Commerce Act.

The Court of Appeals ruled (R. p. 1105, Brief, Ap. p. 19) that while Alleghany could validly contract for the purchase of the stock from James Foundation, Alleghany could not lawfully take delivery of the stock without prior specific approval of the Interstate Commerce Commission. Alleghany contended that such approval was not necessary before the delivery date fixed by the purchase contract because of the order (Ex. 8, fol. 3127) of the Commission and a trust indenture with the Chase National Bank, as trustee, (Ex. 9), approved by said order which provided for deposit of the stock with an independent voting trustee, thus preventing an acquisition of control in violation of the provisions of Section 5.

The trust indenture contained the following provision (fol. 3142):

> "(b) Alleghany Corporation and Chesapeake & Ohio each agrees that it will, *promptly upon receipt thereof,* assign, transfer and deliver to the Trustee hereunder all voting stocks of carriers subject to the Interstate Commerce Act which it may hereafter acquire, excepting stocks of carriers presently affiliated with the Chesapeake & Ohio, unless acquisition thereof is expressly approved by the Commission or unless the Commission shall otherwise order." (Emphasis supplied.)

Alleghany was bound by the trust indenture (fol. 3142) and the order (fol. 3132) of the Commission, "promptly upon receipt" of voting stock of a carrier subject to the Interstate Commerce Act, which "it may hereafter acquire", to "assign, transfer and deliver to the Trustee" such stock.

In the report of the Commission (261 I. C. C. 239) further reference is made to such stock as follows (p. 241):

> "* * * Alleghany is prepared to accept an order * * * containing the following conditions * * * (3) that Alleghany and Chesapeake & Ohio shall deposit with the Chase National Bank of the city of New York as independent voting trustee all voting stocks of carrier corporations subject to regulation under the Interstate Commerce Act, not at present affiliated with the Chesapeake & Ohio system, whether now owned or hereafter acquired by either of them * * *."

(pp. 242-243):

> "The essence of the proposal is that Alleghany limit its control of carriers subject to regulation under the Interstate Commerce Act to the Chesapeake & Ohio, the Nickel Plate, the Pere Marquette and, subject to the existing voting trust, The Wheeling & Lake

Erie Railway, together with other subsidiaries and affiliated carrier corporations already a part of the transportation system known generally as the Chesapeake & Ohio lines. Alleghany does not at present own stock of any carrier corporation outside this system except stocks of the Missouri Pacific Railroad Company. These would not be deposited since they do not represent any voice in the management of the Missouri Pacific properties. The only carrier corporation other than the Missouri Pacific, outside the Chesapeake & Ohio system, controlled by Alleghany is the United States Trucking Corporation (U. S. Trucking), all the outstanding stock of which is owned by Pittston. *By depositing in trust its holdings of Pittston stock, Alleghany would effectively divest itself of control of U. S. Trucking without sacrificing intrinsic values which at present inure to its own stockholders and without depriving minority Pittston stockholders of whatever rights they have incident to the control of U. S. Trucking by Pittston. Under its proposal, Alleghany would be committed to deposit in trust any voting stocks of carrier corporations not at present affiliated with the Chesapeake & Ohio which it may hereafter acquire. It would also be prevented from acquiring indirect control of other carriers, except with the approval of the Commission, through the Chesapeake & Ohio.* The proposed deposit by the Chesapeake & Ohio of its holdings of Pittston stocks and Erie stocks and the proposed agreement of the Chesapeake & Ohio to deposit in trust voting stocks of other carrier corporations outside its own system which it may hereafter acquire *without our authority,* are intended to accomplish *this result.*" (Emphasis supplied.)

The "result" mentioned is prevention of "control", direct or indirect, by Alleghany or Chesapeake & Ohio, of other carriers without approval of the Commission. The Commis-

sion contemplated that the stock so purchased and deposited might or might not have sufficient voting power to constitute "control", which is always a question of fact to be decided by the Commission on the circumstances of each particular case. (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 144.) Except for the possibility that a stock purchase *might* be large enough to influence control there would be no need for the voting trust, since the Commission does not regulate the investments of carriers.

The Commission's order and the trust indenture provided that the stock should be transferred promptly to the independent voting trustee, which would exercise the voting power. The Commission also required that quarterly reports of the stock deposited with the trustee be made by the depositors (3134) and the Commission retained continuing jurisdiction over the depositors to act at any time with reference to the indenture and even to require immediate resignation of the trustee and to appoint a new one (261 I. C. C. p. 262).

Exhibits 8 and 9 were not based on an application by Alleghany for approval of a specific purchase but for approval of the indenture in order that it might cover future purchases. The indenture (fol. 3142) excepted from the requirement of deposit with the Chase Bank only "stocks of carriers presently affiliated with the Chesapeake & Ohio." The obvious purpose of the Commission was to require Alleghany to deposit "any voting stock" that it may acquire (excepting only the Chesapeake & Ohio system) with the Chase Bank as Trustee, and unless the Commission should otherwise order, *thus making it wholly unnecessary to determine in any case, prior to purchase and deposit, whether the voting stock so acquired was a controlling block or not.* The determination of that question involves the consideration by the Commission of factual evidence.

The voting power that Chase holds as such trustee is held for the public benefit, not for itself or for Alleghany. The Chase Bank was trustee for Alleghany as a beneficiary only as to Alleghany's interest as an investor having the right

to acquire active control only if the Commission should approve with the findings required by law.

The argument of the Court below that Alleghany claims the right to purchase the control of any number of unnamed railroads (R. p. 1108) is merely an horrendous supposition which defeats the practical plan of operation by the Commission to observe continuously and to control investments by Alleghany in the stock of carriers subject to the Interstate Commerce Act. Under the voting trust, the Commission received continuous reports of the stock deposited and was able at any time to execute the public policy respecting the control of carriers.

By the consummation of the contract, Alleghany would not have acquired "control" of Western Pacific within the meaning of the Interstate Commerce Act. While the block to be sold was large enough to give practical working control to a holder entitled to vote it, the actual transfer of the common stock would not have made Alleghany the legal title holder and would have given it no "control" whatever within the meaning of the statute. The transfer would have been by James to Alleghany followed "promptly" by a transfer by Alleghany to the Chase Bank, Trustee. Alleghany would not thereby acquire "control" of Western. What Alleghany would acquire would be the beneficial ownership as an investor—the interest of a *cestui que trust*. Alleghany did not contemplate acquiring, and the contract to sell did not provide that it should acquire, the "control" of Western Pacific without a new application to the Commission.

Alleghany planned immediately on delivery of the stock to deposit it under the indenture in accordance with the order of the Commission. The Court of Appeals, upon the application for a rehearing, and without mentioning the matter in its first opinion, erroneously described the Trial Judge's Finding 58 (fol. 85) as deciding that Alleghany did not intend to trustee the stock (R. pp. 1174-1180, Brief, Ap. pp. 29-33). *Such lack of intent was not argued before the Court of Appeals, nor even mentioned in the respondent's brief, and the point was raised for the first time in that Court in written*

questions that were submitted by the Clerk of the Court to counsel for both sides after the petition to the Court of Appeals for rehearing. These questions are printed in the appendix hereto (p. 23).

The Trial Judge made no finding that Alleghany did not intend to deposit the Western Pacific stock with the Chase Bank. Respondent did not ask such finding from the Trial Judge. The only findings on this subject asked by the Respondent in the District Court were the following:

> "38. The purpose of Alleghany's attempted purchase of defendant's common stock was to acquire control of Western Pacific (S.M. 255, 259-60, 264-6, 335, 712).
>
> "39. Alleghany did not apply for or receive Interstate Commerce Commission approval on any purchase by Alleghany of defendant's Western Pacific common stock."

These findings were incorporated in the Trial Judge's Finding 58 (fol. 85) which in its entirety was as follows:

> No. 58. In February, 1951, and at the date of trial, 153,165 shares of the common stock of Western alone carried sufficient voting power to affect strongly management policies where such shares were held as a single block by a person or persons desiring to exercise control. The purpose of Alleghany in offering to purchase the James Western common stock was to acquire control of Western; however, Alleghany did not apply for or receive the approval of the Interstate Commerce Commission of any purchase by Alleghany of the James Western common stock."

This finding is correct and uncontradicted, but there is no justification for describing it as a finding of fact by the District Judge that Alleghany did not intend to deposit the Western Pacific common stock with the Chase Bank as trustee.

The assumptions necessary to support such a conclusion re:

(1) that Young intended wilfully to violate the law by acquiring control of a carrier without Commission approval (though the Trial Judge made no such finding and though Young was an experienced railway operator).

(2) that Young and Purcell lied when they testified to Alleghany's intent to trustee the stock (though the Trial Judge made no such finding and though this testimony of Young and Purcell was never challenged and never contradicted).[1]

(3) that an intention "to acquire control" necessarily means an intention to acquire control immediately and illegally [although there were methods by which such control could lawfully be acquired within a reasonable time either by applying to the Commission and securing its approval or by Alleghany's divesting itself of control of Chesapeake & Ohio, while meantime, as determined by the Commission, (*supra* p. 5), the purchaser was completely separated from control by the deposit in the Chase Bank.]

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[1] On February 4, 1951, immediately prior to the purchase, Young discussed with Kirby, President of Alleghany, the position of the I.C.C.

"I told him [Kirby] that there was no reason to believe that it would not be exactly similar to the position that it [I.C.C.] *had taken on our purchase of large and possibly controlling blocks of the Rock Island, the Seaboard and other railroads, which had been deposited with the Chase Bank under the agreement* and without the slightest repercussion or question of any kind * * * there was not the slightest thing to be concerned about." (R. 1016) (Emphasis added.)

Purcell's testimony supported that of Young:

"* * * it was in the first conversation [on February 4] that I stated to Mr. Young that, of course, if we bought the Western Pacific common stock *it would be necessary to deposit the shares under the voting trust* which Alleghany Corporation had with the Chase National Bank in respect of securities of railroad companies, voting securities.

"Mr. Young replied to me that, of course, we would deposit the shares in the trust immediately upon purchase." (R. 1206, 7) (Emphasis added.)

Defendant offered no witnesses.

If, as we contend, the order of the Commission is such as to determine that the contract could have been performed and its purposes attained in a lawful manner, the purchaser is entitled to the presumption that it intended to act in the lawful manner in the absence of convincing evidence and a finding to the contrary. The trial court's finding No. 58 contains no language indicating that Alleghany is not entitled to the benefit of this presumption.

In *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245 (2d C. 1936), a suit for patent royalties to which the defense of illegality was interposed, the Court, speaking through Judge Chase, said at 246:

> "The point is that, as the agreement did not call for action by either party in violation of any law, the contract could be lawfully performed in full in accordance with its terms *and so is to be taken to have embraced only lawful acts in the absence of proof to the contrary.*" (Emphasis supplied.)

In *Meyer* v. *Price*, 250 N. Y. 370 (1929), the Court stated page 378:

> "If there be two reasonable interpretations to an instrument, one making it illegal and the other legal, it is the duty of the courts to adopt the latter."

In justification of its erroneous finding about Alleghany's intent, the Court of Appeals relates certain "crucial facts" (R. p. 1177), chief of which was that nobody had conferred with the trustee about making the deposit. Section 1(b) of the trust indenture (fol. 3142) required Alleghany "promptly" to deposit the purchased shares with the trustee and Section 6 (fol. 3151) requires the trustee to accept them under the trust. No further arrangement was needed. There was nothing to "confer" (R. p. 1177) about. No conference was needed, any more than it would be necessary for Alleghany to "confer" in advance if it in-

tended to deposit checks or cash to the credit of its account tomorrow or day after. It was nothing but routine. And, as the record shows, it was routine also to use voting trust certificates (fol. 3145) instead of stock certificates on Alleghany's loans at the Chase Bank and Manufacturer's Trust Co. and it was routine to refer to them as stock.

Reasons for Granting the Writ.

1. The Court of Appeals has prevented the operation of the order of the Interstate Commerce Commission (Ex. 8) and the trust indenture (Ex. 9), and has substituted its own discretion in the regulation of carriers instead of the plenary and exclusive discretion given by Congress to the Interstate Commerce Commission. The Interstate Commerce Act intends, not to prevent all acquisitions of control of carriers by persons controlling other carriers, but to insure that such acquisitions shall be accomplished only in accordance with the Act. The question of determining the public interest and the mechanics for so doing rest entirely with the Commission.

> *U. S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535, 536 (1946).

"The Commission is the guardian of the public interest" and "has been entrusted with a wide range of discretionary authority, * * *" in the exercise of which it must use its "expert judgment".

> *U. S.* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241 (1945).

2. The decision of the Court of Appeals (R. pp. 1100-1108, Brief, Ap. pp. 15-22) is necessarily based on the premise that deposit of stock with an independent trustee does not separate beneficial ownership from voting control. This is contrary to the long-standing practice of the Commission, its

orders establishing voting trusts for that very purpose, and its determination of their adequacy therefor.

Lehigh Valley R. Co., 271 I. C. C. 553, 554 (1949);

Chesapeake & Ohio Railway Purchase, 261 I. C. C. 239, 243 (1945);

Wabash Railroad Company Control, 252 I. C. C. 319 (1942) *supplementing* 247 I. C. C. 365 (1941);

I. C. C. v. *B. & O. R.R. Co.*, 152 I. C. C. 721 (1929), Supp. rep., 156 I. C. C. 607 (1929).

3. The decision of the Court of Appeals is an unlawful interference with the Commission's administration and enforcement of the Interstate Commerce Act, in that it denies to the Commission the discretion to permit a block of stock which might constitute control to be held by an independent voting trustee pending consideration by the Commission of the public policy. Such action by the Court of Appeals interferes with the discretion of the Commission to choose the method of exercising its jurisdiction.

4. The finding that Alleghany did not intend to deposit the purchased stock with the voting trustee violates Rule 52, in that it fails to give regard to the Trial Judge's opinion of the credibility of witnesses whom he saw and heard. The Trial Judge was not even asked by Respondent to make such a finding. Young and Purcell, ranking executive officers, directly testified that they intended to cause Alleghany to deposit the stock and the Trial Judge made no finding discrediting either of them. Their testimony was uncontradicted. The Court of Appeals, however, erroneously attributes such a finding to the Trial Judge. Under the circumstances the Court of Appeals could not itself make such a finding of fact except in violation of Rule 52.

In *U. S.* v. *Yellow Cab. Co.*, 338 U. S. 338, at page 341, the Court said:

> "Rule 52, Federal Rules of Civil Procedure, provides, among other things:
>
> > 'Findings of fact shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*' (Emphasis supplied.)
>
> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified."

The Trial Judge listened to the testimony of the witnesses Young and Purcell. He was not requested by Respondent to make a finding to impugn the truthfulness of their testimony and he made no such finding.

CONCLUSION.

It is respectfully submitted that the questions raised in this case are of sufficient gravity and importance to require this court to issue a writ of certiorari to the U. S. Court of Appeals, for the Second Circuit, to review its decision made herein.

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 175—October Term, 1953.

(Argued March 3, 1954 Decided June 8, 1954.)

Docket No. 22947.

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC. and INVESTORS DIVERSIFIED SERVICES, INC.,
Plaintiffs-Appellants,

—*v.*—

JAMES FOUNDATION OF NEW YORK, INC.,
Defendant-Appellee.

Before:

CHASE, *Chief Judge* and FRANK and HINCKS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, entered by Judge Ryan. AFFIRMED.

WHITE & CASE (Arthur L. Corbin, Robert J. Bulkley, J. Adam Murphy and Melvin L. Milligan, II, of counsel) *for appellant.*

MILBANK, TWEED, HOPE & HADLEY (A. Donald MacKinnon, William Eldred Jackson and Janet P. Kane, of counsel) *for appellee.*

FRANK, *Circuit Judge*:

As the facts are fully stated in the opinion and findings of the district judge, reported in 115 F. Supp. 282, we shall not repeat them.

We shall assume, *arguendo,* that the James Foundation had conferred upon W & P authority to make a contract for the sale of the stock constituting control of the Western Pacific Railroad Company, and also authority to delegate that authority to S & Co. and Baird; that W & P did thus delegate that authority; that accordingly, on either February 5 or 8, 1951, a contract for the purchase and sale of the stock was made which bound both Alleghany and the James Foundation; and that that contract did not run afoul of the Statute of Frauds. Nevertheless, we affirm for the following reasons:

The agreement between the James Foundation and W & P provided that, if any contract of sale were made, then delivery of the stock by the James Foundation and payment by the purchaser were to occur on the third business day after the date of such contract. If a contract was made on either February 5 or February 8, then it was necessary that Alleghany be able to pay the purchase price on either February 8 or February 11. For, considering the circumstances and the character of the agreement between the James Foundation and W & P, time was plainly of the essence.

Alleghany then had control of the Chesapeake & Ohio Railroad. Under 49 U. S. C. § 5, the Chesapeake & Ohio is a common carrier as are Western Pacific and Alleghany (because of the latter's control of Chesapeake & Ohio). 49 U. S. C. § 5(4) provides that "It shall be unlawful for any person," without the approval of the Interstate Commerce Commission, "to enter into any transaction" by which a carrier will "acquire control of another carrier," or "to accomplish or effectuate or to participate in accomplishing or effectuating" the control or management in a common in-

terest of any two or more carriers. * * *" It is highly improbable that, in the brief period available,[1] Alleghany could have procured the approval of the Interstate Commerce Commission of the acquisition of the controlling interest in Western Pacific.[2] Alleghany had the burden of

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[1] The agreement between the James Foundation and W & P also provided that the power delegated to W & P should cease to exist on February 14, 1951. Assuming *arguendo*, that it would have sufficed if Alleghany were able to perform by February 14, still Alleghany had, at most, but nine days to procure Interstate Commerce Commission approval.

[2] Pertinent portions of 49 U. S. C. § 5 read as follows:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—(1) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or (ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order until it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provision of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads as a prerequisite to its approval of the proposed transaction, to require upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person, thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control; Section 20(1) to (10), inclusive, of this chapter, sections 304(a)(1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title (which relate to reports, accounts and so forth, of carriers), and section 20a(2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provision. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management.

"(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—(a) if such transaction is by a carrier, and if the effect of a transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier; (b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier; (c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of

proving that it could have done so. This burden Alleghany did not discharge. Indeed, it never took any steps to submit the matter to the Commission.[3]

It follows that (ignoring for the moment the Commission's decision in Chesapeake & O. Ry. Co. Purchase, 261 ICC 239) Alleghany could not lawfully have become owner of the stock within the required period and therefore would have been unable to perform the contract with the James Foundation. For, although Alleghany and the James Foun-

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them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

"(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person to issue such writs of injunction or other proper process mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

The trial judge found that "The purpose of Alleghany in offering to purchase the James' Western common stock was to acquire control of Western. * * *" This finding is supported by the allegations of Alleghany's complaint and by the testimony of Young, Chairman of the Board of Alleghany.

[3] The trial judge found the following: The trustees of the James Foundation on February 8 requested Wyer "to see one of the Interstate Commerce Commissioners to informally present the matter and endeavor to secure an unofficial reaction to a sale to Alleghany. The next day, February 9, Wyer did go to Washington and there saw a member of the Commission. Wyer was advised, in substance, that should the matter be duly presented, the Commission would probably institute an investigation to determine whether the transfer involved a violation of Sections 5(2) and (4) of the Act."

dation could validly contract for the purchase and sale of this controlling interest without previous Interstate Commerce Commission approval,[4] nevertheless, absent such approval, the performance of that contract—the "accomplishing" or the "effectuating" of the acquisition of the stock—would have been illegal, and under 49 U. S. C. §§ 5(4), 5(7) and 10(1),[5] would have made each of the parties guilty of a crime. No court should encourage violation of the clear statutory policy by enforcing performance of such a contract—whether by awarding specific performance of the acquisition or damages for not performing—when Commission approval could not be had within the time limit.[5a]

It may be suggested that, had the James Foundation itself (*i.e.*, not through an agent) entered into the contract, there would have been an implied waiver of the time provision. Such a suggestion would be of doubtful cogency since, in the face of that provision, it would seem that Alleghany took the risk of not in time procuring the Commission's approval. But we need not now so decide, since here the sales contract was made by agents whose sole authority,

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[4] See, e.g., *Watson Bros. Transportation Co.* v. *Jaffa*, 143 F. (2d) 340 (C. A. 8); *A. C. Wiley & Sons, Inc.*, 85 F. Supp. 542, aff'd 338 U. S. 902; *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. (2d) 509 (C. A. 6); *Zabarsky* v. *Flemings*, 32 Atl. (2d) 663 (Vt.); *Royal Blue Coaches, Inc.* v. *Delaware River Coach Lines, Inc.*, 52 Atl. (2d) 763 (N. J.), appeal dismissed, 65 Atl. (2d) 264; *McLean* v. *Keith*, 72 S. E. (2d) 44 (N. C.).

[5] 49 U. S. C. § 10(1), so far as pertinent, reads as follows: "Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: * * *"

[5a] See, e.g., *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F. (2d) 838, 843-844 (C. A. 2).

contained in the agreement between the Foundation and W & P, gave no power to waive the time provision, and the Foundation did not in any way ratify such an implied waiver.

We think the Interstate Commerce Commission, by its decision in *Chesapeake & O. Ry. Co. Purchase,* 261 ICC 239 (1945), did not give advance approval of any future purchase by Alleghany of the controlling stock of any railroad, provided only Alleghany deposited the stock with the Chase National Bank under the trust agreement which conferred on that bank as trustee the exclusive power to vote the stock, since, in its opinion in that case, the Commission stated (p. 241): "It is the intention of Alleghany to acquire or dispose of securities of other corporations from time to time, including securities of carriers subject to regulation under the Interstate Commerce Act. It is, however, Alleghany's intention to limit its control of such carriers to the Chesapeake & Ohio and its affiliated carriers so long as such control continues and *subject to the right of Alleghany to apply for control of such other carrier or carriers as it may consider to be in the public interest.*"[6] The Commission also said (p. 261): "We have given careful consideration to the proposal by Alleghany in its petition filed on April 13, 1945, and heretofore described more in detail, with respect to *limiting its control of carriers subject to the Act to only the Chesapeake & Ohio and its affiliated companies, unless further authorization be granted by us.* We conclude that such restriction of control is desirable and shall impose conditions in this respect."[7]

These statements must, we think, be read as qualifying the approval the Commission gave in 1945 of the retention or purchase by Alleghany of the stocks then specifically under consideration. Otherwise, there would have been a surpris-

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[6] Emphasis added.

[7] Emphasis added.

ing advance benediction of all Alleghany's future acquisitions of control. 49 U. S. C. § 5(b) requires that "whenever a transaction [for control] is proposed," the Commission, before entering an approval order, "shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated," shall "afford a reasonable opportunity for interested persons to be heard," and shall make a finding that the transaction "will be consistent with the public interest." This requirement, we think, precludes the entry of any blanket Commission order approving future control-acquisitions of any un-named railroad whatsoever.

AFFIRMED.

Questions by the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.
UNITED STATES COURTHOUSE

Foley Square,
New York 7.

A. DANIEL FUSARO,
Clerk.

Alleghany Corporation, Investors Syndicate of America, Inc. and Investors Diversified Services, Inc.

v.

James Foundation of New York, Inc.

The Court directs me to advise you that it desires appellee to file, on or before July 20, 1954, not less than three copies of a typewritten answer to appellants' petition for rehearing. Appellee, in addition to such arguments as it cares to make, shall include a discussion of the following:

1. The amended complaint, which is silent concerning a deposit with the Chase Bank, alleges that Alleghany contracted to "purchase" the Western Pacific stock; states that this stock "could afford to its owner practical control and a voice in the management of the railroad," and "that Alleghany purchased the common stock because of its investment value and the qualities of control which it possessed"; and prays that defendant be directed to "deliver" that stock "to plaintiffs." Young testified that Alleghany sought to buy "control" of Western Pacific, and that this purchase "was moving in (the) direction" of a transcontinental system," on which Young said, "I had always set my heart." The trial judge found that Alleghany's purpose "was to acquire control of Western."

Is the foregoing consistent with an inference that Alleghany intended to deposit the stock under the trust agreement with Chase?

2. The basic agreement (R. 47-48) provided, "Purchaser represents that it is purchasing the stock for its own account for investment and not with a view to distribution thereof." Can Alleghany argue, then, that it planned to resell the Western Pacific stock? If not, is not the inference amply justified that Alleghany could realize the value of a purchased "control" only by itself exercising that control and not having merely the benefits of equitable ownership divorced from "control" by Alleghany?

3. If Alleghany, without further I.C.C. approval, can deposit with Chase the controlling stocks in any number of railroads, will not Chase itself be violating the statute unless, each time before it acquires more than one "control", it obtains such approval? Did the I. C. C. in Matter of Chesapeake & Ohio Railway Purchase, 271 ICC 5, or Pere Marquette Railway Company Merger, 267 ICC 207, decide, directly or indirectly, that Chase validly held the New York Central stock? At any rate would not James have been acting unlawfully if it aided Chase, without Commission approval, in acquiring control of Western Pacific since at that time Chase (according to the argument in the petition for rehearing) had control of New York Central?

4. Assuming that the deposit with Chase was intended, would not Alleghany have been prohibited, under the contract, from causing Chase to resell the Western Pacific stock? If so, would Alleghany have procured the value of "control"? If not, would Alleghany be entitled to specific performance? Would it be entitled to any damages excepting only the difference between the contract price and the market price? Were there any such damages?

The court desires appellants to file, on or before July 20, 1954, not less than three copies of a typewritten brief discussing the foregoing four points.

Very truly yours,

A. DANIEL FUSARO,
Clerk.

Opinion on Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 175—October Term, 1953.

(Petition filed June 23, 1954 Decided August 3, 1954.)

Docket No. 22947.

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC. and INVESTORS DIVERSIFIED SERVICES, INC.,
Plaintiffs-Appellants,

—*v.*—

JAMES FOUNDATION OF NEW YORK, INC.,
Defendant-Appellee.

Before:

CHASE, *Chief Judge* and FRANK and HINCKS, *Circuit Judges.*

On Petition for Rehearing.

FRANK, *Circuit Judge*:

Plaintiffs, in a petition for rehearing, virtually concede that our opinion is correct except insofar as it relates to the meaning and effect of the decision and order of the Commission in Chesapeake & Ohio Ry. Co. Purchase, 261 ICC 239 (1945). Plaintiffs' arguments may be summarized thus:

(a) The Commission's 1945 opinion, as interpreted in a subsequent opinion of the Commission, allowed Alleghany to purchase controlling blocks of stock, of any number of

railroads, without further ICC approval, provided only that Alleghany trusteed such stock. (b) "Alleghany planned immediately on purchase to deposit the stock under the trust deed" with the Chase Bank, and thus would not acquire control within the meaning of Section 5(2) of the Interstate Commerce Act. This court, therefore, erred in holding that Alleghany could not lawfully acquire the Western stock without new Commission approval, and accordingly erred in holding that Alleghany had, and failed to sustain, the burden of proving that it could have obtained such approval within the short period for delivery provided in the contract. We shall discuss these contentions in turn.

1. *Contention that the ICC in 1945 authorized Alleghany in the future to acquire, without further ICC approval, the controlling shares of stock of any number of railroads, provided only these shares were deposited with the Chase under the trust agreement.*

In their rehearing petition, plaintiffs for the first time refer to *Matter of Chesapeake & Ohio Ry. Co. Purchase,* 271 ICC 5, decided in 1948. In that case, the Commission had before it an application to modify its earlier 1945 order—*Chesapeake & Ohio Ry. Co. Purchase,* 266 ICC 239—(1) to permit the transfer of legal title from Chase to Chesapeake & Ohio of 400,000 shares of the New York Central deposited with Chase, and (2) to permit Young and Bowman to become directors of New York Central while retaining their positions as directors of the Chesapeake & Ohio.[1] The evidence showed that, sometime before 1947, Alleghany, without any specific Commission approval, had acquired the New York Central shares, had deposited them under the trust agreement with Chase, and had so

[1] The Commission, in its 1945 opinion, had provided that neither Alleghany nor Chesapeake & Ohio should enter into interlocking directorates with any company the stock of which was trusteed with Chase.

advised the Commission.[2] Subsequently, Alleghany had transferred to Chesapeake & Ohio the voting trust certificates representing these deposited shares. The Commission in this 1948 case, refused the requested permissions on the ground that they would violate Sections 5(4) and 20(a)(12) of the Interstate Commerce Act and Section 7 of the Clayton Act.

As we understand plaintiffs' rehearing petition, they argue thus: (1) The Interstate Commerce Commission in 1948 knew that, without specific Commission approval, Alleghany, some time after 1945, had acquired the New York Central shares and had transferred legal title to these shares to the Chase by depositing them under the trust agreement. (2) The Commission, in denying authorization of the transfer of legal title to the New York Central shares from Chase to Chesapeake & Ohio, held that such a transfer would put Chesapeake & Ohio in control of the New York Central Railroad, within the meaning of Section 5(2) of the Interstate Commerce Act. (3) Thus the Commission held, in effect, that by the deposit of these shares with Chase, the Chase had obtained control of the New York Central Railroad. (4) Therefore, the Commission in 1948 inferentially interpreted its earlier (1945) opinion and order as authorizing Alleghany, without further approval, to acquire in the future the controlling shares of any and all railroads, provided only that Alleghany deposited such shares with Chase. (5) Consequently (so plaintiffs assert in their petition) if the Western stock were similarly deposited with Chase simultaneously with the delivery of that stock to Alleghany, then "Alleghany would never acquire the control of Western that would require the specific approval of the Interstate Commerce Commission. That 'control' would have passed directly to the Chase Bank."

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[2] Plaintiffs refer to a statement in a footnote in *Pere Marquette Railway Company Merger*, 267 ICC 207, to show that in 1947 the Commission knew of these facts.

We think this contention rests on a mistaken view of the Commission's 1948 opinion. The Commission did not there hold that the 400,000 shares of New York Central—comprising but 6.2% of its outstanding voting shares—constituted control of that railroad. The Commission explicitly stated that the proceeding was not an application "pertaining to control of the New York Central" under Section 5 of the Interstate Commerce Act. The Commission's opinion dealt at length with the two requests—to acquire title to the shares and to authorize the Chesapeake & Ohio directors to become New York Central directors—as intertwined. It pointed out that, according to the evidence, Alleghany and Young hoped that, if these two requests were granted, the result would soon be that the two railroads would be "managed in a common interest." The Commission stated that Young had testified he hoped to achieve this result through the exercise "of our persuasive powers" on the other New York Central directors, and that, if those persuasive powers failed, the petitioners would soon ask the Commission for permission to exercise control of that railroad. The opinion quoted Section 20(a)(12) of the Interstate Commerce Act as to interlocking directors of railroads.[3] It also quoted Section 7 of the Clayton Act,[4] and said that "the effect of

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[3] It reads in part as follows:

"20a(12). It shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the commission, upon due showing, in form and manner prescribed by the commission, that neither public nor private interests will be adversely affected thereby."

[4] Section 7 of the Clayton Act reads in part as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

the release of the stock of the New York Central from the trust together with the interlocking directorates sought by the applicants would be to substantially lessen competition between the New York Central and the Chesapeake & Ohio," adding that "the policy of Congress is to be found not only in the consolidation provisions of the Interstate Commerce Act, but also in the anti-trust Acts," and noted that Section 20(a)(12) of the Interstate Commerce Act should be considered in connection with the Clayton Act.

We think the Commission's opinion cannot be read as holding (1) that the mere ownership of the 400,000 New York Central shares constituted control and (2) that, absent any specific Commission approval, a deposit by Alleghany of controlling shares of any railroad in trust with Chase satisfied Section 5 of the Interstate Commerce Act.

Plaintiffs have supplied further light on this 1948 opinion. After the filing of the petition for rehearing, this court asked both parties to answer questions which were substantially as follows: If, absent specific Commission approval, Chase, through deposits, acquired control of more than one railroad, would Chase itself not violate Section 5 of the Interstate Commerce Act? Therefore, if the 400,000 shares of the New York Central conferred control of that railroad, did Chase validly hold these shares? If these shares conferred such control, would not participation in accomplishing the deposit with Chase of the Western stock, while Chase continued to control the New York Central, make Alleghany, James and Chase violators of the Act? In a memorandum filed with us, plaintiffs, answering these questions, replied that the Commission, in its 1948 opinion, did not determine "whether the ownership of the 400,000 shares of the New York Central actually constituted control of that carrier." [5]

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[5] Plaintiffs seem to argue that (1) even if the block of New York Central stock did constitute control, yet (2) Chase did not obtain that control, and therefore did not violate Section 5 of the Interstate Commerce Act, because the Commission retained the power to require the resignation of Chase as

As we said in our original opinion in this case, we think that "Section 5 of the Interstate Commerce Act precludes the entry of any blanket Commission order approving further control-acquisitions of any un-named railroad whatsoever." Only the most unequivocal statement by the Commission would induce us to believe that it had entered such a blanket order.[6]

The foregoing alone disposes of plaintiffs' petition. However, we think it well to consider also plaintiffs' second contention.

2. *Contention that Alleghany intended immediately to trustee the Western stock.*

Neither plaintiffs' original nor their amended complaint says a word about any deposit with Chase. The amended complaint alleges that Alleghany contracted to "purchase" the Western stock; states that this stock "could afford to its owner practical control and a voice in the management of the railroad," and "that Alleghany purchased the common stock because of its investment value and the qualities of control which it possessed"; and prays that defendant be directed to "deliver" that stock "to plaintiffs".

The pleadings, and even more pronouncedly the evidence at the trial, raised the issue of the intent or purpose of Alleghany in its effort to buy the stock of Western. The trial judge reached no legal conclusion on the issue of illegality, because he held that no purchase agreement had ever been made. But, as an able and experienced trial judge, he wisely found the facts relative to that issue, in order to avoid another trial, should we deem that issue important. Having

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trustee and the substitution of another trustee in its place, and the Commission in this way "completely controlled the Chase." We think that argument untenable. Until Chase was removed, it had control, within the meaning of Section 5 of the Interstate Commerce Act, of any deposited stock, if voting that stock gave control of a railroad under Section 5.

[6] In an Appendix to this opinion, we discuss an argument, advanced by plaintiffs, based on the language of a Commission opinion in 1947.

heard and seen the witnesses testify, he found that "the purpose of Alleghany in offering to purchase the James' Western Pacific common stock was to acquire control of Western. * * *" [7] We think this finding amply supported by the evidence and therefore not "clearly erroneous." The evidence includes the following:

When Baird first approached Young on February 3, Baird "sounded out" Young on his possible interest in the purchase of a large block of Western, "amounting in effect to working control." Young replied that "we might well be interested." Baird testified that he had approached Young because he felt, from previous talks with Young, "that it would fit into his philosophy of a transcontinental railroad system." Young testified that Alleghany sought to buy "control" of Western Pacific, and that this purchase "was moving in (the) direction" of a transcontinental system," on which Young said, "I have always set my heart." If, however, the stock were deposited in trust, so as to deprive Alleghany of voting power, Young's aim to acquire a transcontinental system would not be achieved.[8] Young further testified that Baird told him that Pflugfelder was "the controlling interest in the Denver & Rio Grande, and that if we accepted the Baird offer, his relationship with Mr. Pflugfelder was such that he could induce him to cooperate with us in a community of interests." Breck testified he had said to Baird "that were Alleghany Corporation to make this purchase through Mr. Wyer and ourselves, that we might establish a

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[7] The full sentence reads: "The purpose of Alleghany in offering to purchase the James' Western common stock was to acquire control of Western; however, Alleghany did not apply for or receive the approval of the Interstate Commerce Commission of any purchase by Alleghany of the James' Western common stock."

[8] Plaintiffs point to a provision of the trust agreement with Chase providing that the "depositor" (Alleghany) may direct the trustee's vote as to corporate matters other than election of directors. It might be argued that, via this provision, Alleghany could vote for a merger or consolidation of Western with any other railroad. But any such transaction would be illegal without Commission approval, and the procuring of such approval was most conjectural. *Cf. Chesapeake & Ohio Railway Company Purchase*, 271 ICC 3 (1948).

community of interests between the Western Pacific and the Denver & Rio Grande railroad at its principal connection in Salt Lake City, that it might increase the community of interests that already existed." These suggestions would have been meaningless unless Alleghany were to control the Western Pacific.[9]

Perhaps the foregoing is not conclusive. More important is Young's testimony that Breck said to him that, if Alleghany purchased the Western stock, Breck would like, through Young, to become a Western director. But if the stock were deposited with a trustee which would "independently" vote for directors, Young would have no means of satisfying Breck's desire.

True, Young testified that, when, on February 4, Kirby asked what would be the position of the Commission, Young responded that "there was no reason to believe that it would not be exactly similar to the position that it had taken on our purchase of large and possibly controlling blocks of the Rock Island and other railroads, which had been deposited with the Chase Bank under the agreement and without the slightest repercussion or question of any kind"; that "there was not the slightest thing to be concerned about"; and that he would take up the matter with Purcell. Purcell testified he had told Young on February 4 that it would be necessary to deposit the Western shares with Chase under the trust agreement, and that Young had "replied * * * that of course we would deposit the shares immediately upon purchase."

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[9] See the preceding footnote.

Young also testified as follows: In talking with Kirby, President of Alleghany, on February 4, Young said that Baird had offered him appellee's Western stock, "which would constitute control," and Kirby asked whether the block could be bought for less than Saturday's closing; Young had said no, that they ought to take it at Saturday's close and consider themselves lucky, they were not only buying what he considered one of the most undervalued railroad stocks "but we were also buying control, and that I did not think we should quibble about the price," and that the stock represented "working control of the railroad"; later Young told Kirby that "we have bought the stock."

But—and here we come to crucial facts—no one on Alleghany's behalf took any steps to arrange for such a deposit, or to confer with Chase about the matter—even after, on February 5, Wyer reported to Breck, Breck to Baird, and Baird to Young, that the trustees of the James Foundation would not accept any offer from Alleghany (outside the agreement with W & P) unless prior Commission approval were obtained.

The failure to take such steps is underscored by the following: Purcell testified that on February 4—the very day on which, according to the testimony of Young and Purcell, there had been a discussion of a deposit under the trust agreement with Chase—Young told Purcell that, if they went ahead with the purchase, Purcell should talk to Alleghany's banks with a view to substituting the Western Pacific Stock for other items of collateral in Alleghany's bank loans. On February 5, when Young reported that he had made the purchase, he asked Purcell to take up this question with the banks. Anzalone, a vice president of Alleghany, testified that on February 5, he told the Chase that Alleghany was purchasing a substantial amount of Western Pacific stock and would like the Chase to substitute, as collateral under that bank's loans to Alleghany, as much Western Pacific common as possible for cash and governments. The Chase agreed. Significantly, although Chase was also the trustee under the trust agreement, there is no evidence that anything was said by Alleghany to Chase about depositing the Western stock in trust. On February 5, the Executive Committee of Alleghany passed a resolution authorizing the purchase of the Western stock; this resolution contains no reference to any deposit under the trust agreement.

In a letter dated February 8, authorized by Young, Alleghany's attorneys wrote Seligman and Baird, saying they "had sold to Alleghany" the Western common stock, demanded delivery to Alleghany, and referred to suggestions about facilitating that delivery. The letter mentions nothing

of a deposit with the Chase—although plaintiffs, in their petition for rehearing, say that the transfer would have been by James direct to the Chase, or to Alleghany, accompanied by simultaneous transfer by Alleghany to the Chase.

Considering the foregoing, and especially the omission from anything in writing concerning Alleghany's intent to deposit the stock in trust, we think the trial judge could properly refuse (as he obviously did) to credit the oral testimony on the subject, introduced by Alleghany, of witnesses he saw and heard.

Petition denied.

Appendix to Above Opinion.

In its 1945 opinion, the Commission had excepted, from th requirement that Alleghany trustee certain railroad stock "Alleghany's holdings of the stock of the Missouri Pacifi Railroad Company which is now in reorganization unde Section 77 of the Bankruptcy Act." In 1947, in a proceedin for authority to merge the Pere Marquette into the Chesa peake & Ohio—Pere Marquette Railway Co. Merger, 267 IC 207—an independent director of the Missouri Pacific inter vened and asked the Commission to require Alleghany, as preliminary to approval of the merger, to trustee its Missour Pacific stock. The Commission refused. It said (267 IC at 253): "The effect of the order in Chesapeake & Ohio Ry Co. Purchase, supra, is to require the trusteeing of stock o the Missouri Pacific or any successor corporation that th Alleghany may receive in the reorganization of that com pany. In addition, the Alleghany has committed itself i this proceeding to deposit under the trust agreement an such stock so received by it. The trust agreement with th Chase National Bank, in that proceeding, contemplates th further depositing of stock such as that here considered."

Plaintiffs argue that this language supports their interpr tation of the 1945 opinion and order. We cannot agre The statement in the 1947 opinion, that the trust agreemen "contemplates the further depositing of such stock as tha here considered," was made in the context of a considerati of the stock of Missouri Pacific or a successor which migh emerge from a reorganization.

All the Interstate Commerce Commission said in effect wa that its 1945 order required the trusteeing of the stock Missouri Pacific, or such successor, received by Alleghany that Alleghany in that proceeding had committed itself t trusteeing such stock; and that the trust agreement embodie such commitment as to such stock. The fact that All ghany's holdings of Missouri Pacific stock were 33.81% the common did not of course mean that Alleghany woul

receive an equivalent percentage, or even any, of the voting stock on the consummation of the reorganization, or that whatever amount it might receive would constitute control. All that the ICC could determine at the time, in the light of the situation then before it, was that any Missouri Pacific voting stock which Alleghany might later receive would be subject to the terms of the trust agreement. Future events alone would determine whether the ICC would ever face a question of control. The ICC was not dealing with an existing control situation. The Missouri Pacific shares presented a unique problem. While the Commission did not require Alleghany at that time to trustee those shares, since they were then not voting shares—Missouri Pacific being then in reorganization—the ICC stated that, "Should Alleghany acquire any voting stock at the conclusion of the court proceedings, such stock would be covered" by Alleghany's proposals, which included a proposal to trustee all voting stocks of carrier corporations then owned or thereafter acquired (261 ICC 239, 241). The Missouri Pacific situation was given special consideration by the ICC because of its special circumstances. Accordingly, nothing in the ICC's treatment of Missouri Pacific can properly be taken as having general application to any other carriers, unnamed, whose stocks were not in Alleghany's portfolio at the time the ICC approved the trust identure. The authorization of the future deposit of the stock of the reorganized Missouri Pacific was clearly limited to that unique situation with which the ICC, because of its function under Section 77 of the Bankruptcy Act, was, of course, entirely familiar. We think the Commission did not intend to extend that authorization to any number of other future control situations concerning which it was not advised.

Statutes.

Interstate Commerce Act, Pertinent Provisions of Section 5, 49 U. S. C. A., Section 5.

Unifications, mergers and acquisitions of control.

§ 5(2)(a) It shall be lawful, with the approval and authorization of the commission, as provided in subdivision (b)——

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to deter-

mine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transactions, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any persons which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * * * *

Non-carrier deemed carrier upon acquiring control.

§5(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20(1) to (10), inclusive, of this chapter, sections 304(a)(1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title, (which relate to reports, accounts, and so forth, of carriers), and section 20a(2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title, (which relate to issues of securities and assumptions of liability of carriers), includ-

ing in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

Control effected by other than prescribed methods.

§ 5(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control of management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

* * * * *

Plenary nature of authority under section.

§ 5(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which

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case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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HAROLD B. WILLEY, Clerk

No. 430

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

(Docket No. 22947)

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC., and INVESTORS DIVERSIFIED SERVICES, INC.,
Plaintiffs-Appellants,

—against—

JAMES FOUNDATION OF NEW YORK, INC.,
Defendant-Appellee.

PETITION OF APPELLANTS FOR REHEARING.

WHITE & CASE,
Attorneys for Appellants.

ARTHUR L. CORBIN,
ROBERT J. BULKLEY,
J. ADAM MURPHY,
MELVIN L. MILLIGAN, II,
Of Counsel.

UNITED STATES COURT OF APPEALS
FILED
JUN 23 1954

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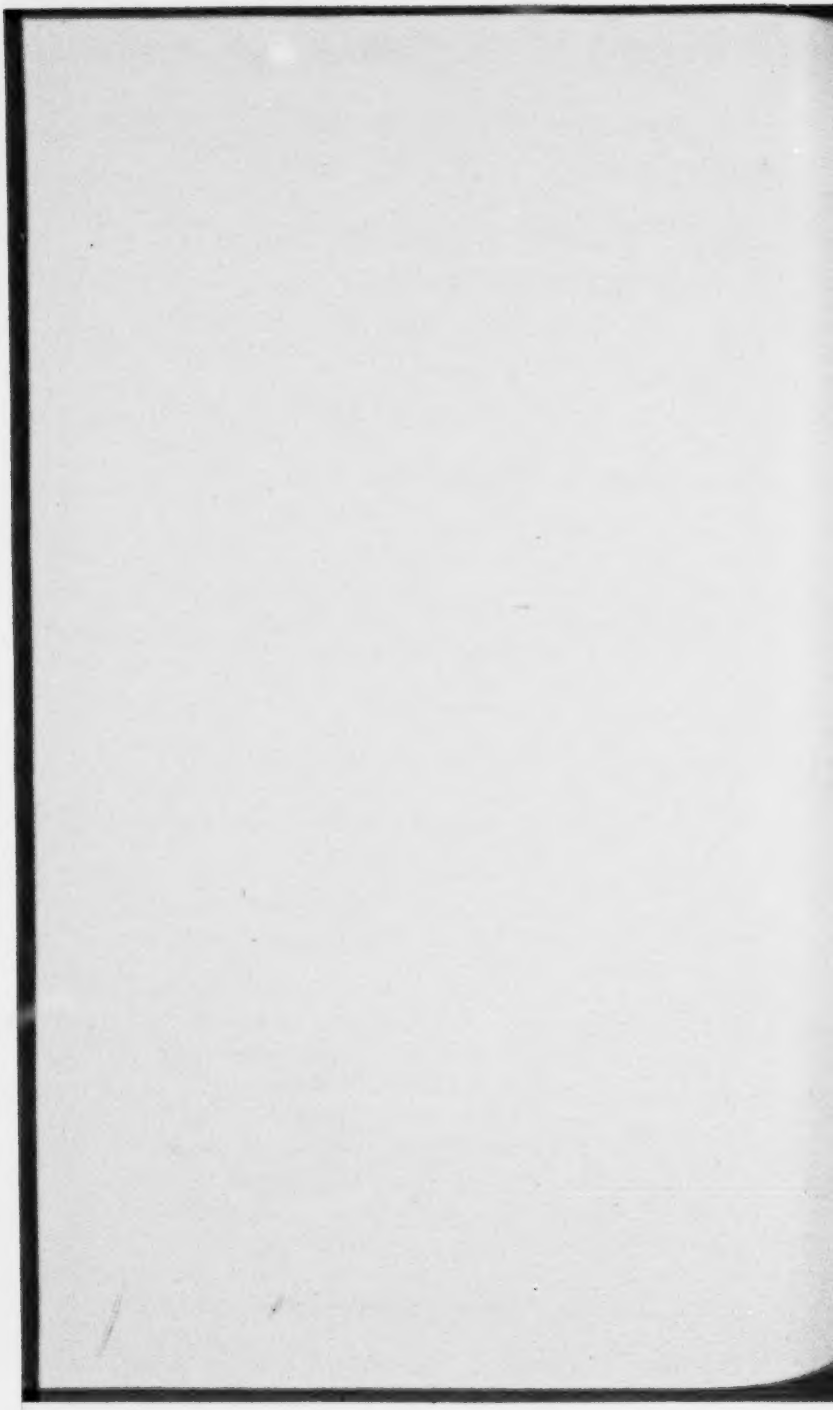

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC., and INVESTORS DIVERSIFIED SERVICES, INC.,

Plaintiffs-Appellants,

—against—

JAMES FOUNDATION OF NEW YORK, INC.,

Defendant-Appellee.

PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FOR A REHEARING.

To the Honorable Judges, United States Court of Appeals for the Second Circuit:

The petition of Appellants respectfully shows:

I.

Summary Statement of the Matter Involved.

The appellants appealed from a judgment (11) of the United States District Court for the Southern District of New York after a trial without a jury in equity for specific performance of contracts for the sale in February 1951 by respondent to appellants and their assignors of 153,165 shares of the common stock and 55,727 shares of the preferred stock of Western Pacific Railroad Company. The judgment below dismissed the complaint upon the merits.

This Court in the decision entered in the Office of the Clerk on June 8, 1954 affirmed the judgment of the District Court. This Court assumed arguendo that contracts for the purchase

and sale of the stock were made by the parties. This Court held (ignoring the deed of trust [Pltfs.' Ex. 9] [3136]) that while Alleghany could validly contract for the purchase of the stock of James Foundation, Alleghany could not lawfully become owner of the stock within the required period (9 days) because the acquisition of title to the stock by Alleghany without prior approval of the Interstate Commerce Commission would violate § 5 of the Interstate Commerce Act. This Court ruled that the burden was on Alleghany to show that it could have procured the approval of the Interstate Commerce Commission in time.

Alleghany planned immediately on purchase to deposit the stock under the trust deed (Ex. 9) in accordance with the order of the Interstate Commerce Commission (Ex. 8) so to do. This order approved the trust agreement (Ex. 9) [3132] and directed compliance with it. The trust agreement contained the following provision:

> "(b) Alleghany Corporation and Chesapeake & Ohio each agrees that it will, promptly upon receipt thereof, assign, transfer and deliver to the Trustee hereunder all voting stocks of carriers subject to the Interstate Commerce Act which it may hereafter acquire, excepting stocks of carriers presently affiliated with the Chesapeake & Ohio, unless acquisition thereof is expressly approved by the Commission or unless the Commission shall otherwise order."

The "acquisition" is plainly not the purchase by Alleghany and transfer to the trustee. The "acquisition" is in the case where Alleghany would purchase stock and retain the stock without making any transfer to the trustee. Only here must Alleghany first have the approval of the Commission as we shall demonstrate.

The Interstate Commerce Commission ordered (3144) that "it shall be its (the trustee's) duty in respect of all of the shares of stock deposited hereunder, * * * *independently* to vote upon the election of directors at meetings of stockholders * * *." (Italics ours.)

Alleghany and any other depositor of stock were only entitled to voting trust certificates (3160). The order of the Interstate Commerce Commission contains no limit with respect to the quantity of the stock of any carrier purchased for deposit under the trust deed.

Unless the transaction here projected would have accomplished for Alleghany an acquisition of control of Western within the meaning of § 5 (2), the transaction would not be unlawful.

We must, therefore, assume that this Court has intended to hold that the projected transaction would have necessarily given Alleghany such control notwithstanding the deposit of the stock with the trustee.

II.

Reasons Relied On for the Allowance of Rehearing.

1. This Court misunderstood the order (Ex. 8) and the decision of the Interstate Commerce Commission (261 I. C. C. 239) as requiring prior approval by the Interstate Commerce Commission to deposit under the trust indenture (Ex. 9) an amount of stock of a carrier subject to the Interstate Commerce Act, which might constitute control of such a carrier.

2. This Court misunderstood the operation of the said trust indenture as determined by the Interstate Commerce Commission, in that this Court, contrary to the determination of the Interstate Commerce Commission appears to hold that the deposit of Western stock by Alleghany with the trustee under Exhibit 9 and the receipt by Alleghany of certificates of beneficial ownership without voting rights would constitute "future acquisitions of control by Alleghany."

3. This Court in the absence of a proceeding which complies with Sections 2321-2323, 28 U. S. C. A., has, we submit,

annulled in part the order of the Interstate Commerce Commission, Exhibit 8, wherein the Commission determined that the plan for the deposit by Alleghany of even a controlling block of stock of a carrier subject to the Interstate Commerce Act was consistent with the public interest. Under the above mentioned sections procedure to "annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money" must be brought by or against the United States, and the Interstate Commerce Commission, as of right, is entitled to be represented by its own counsel. This Court has, it is respectfully submitted, voided part of the order of the Interstate Commerce Commission, Exhibit 8, in a collateral proceeding violative of the said sections of the law of judicial procedure.

Discussion of Reasons.

The Interstate Commerce Commission in *Matter of Chesapeake & Ohio Railway Purchase*, 271 I. C. C. 5, at page 7, considered and decided the effect of the deposit under the very Exhibit 8 by the Chesapeake & Ohio of 400,000 shares of the common stock of the New York Central. The Commission states (p. 7):

> "Beneficial ownership to all this stock is now lodged in the Chesapeake & Ohio. * * * The Chesapeake & Ohio seeks release of the New York Central stock from the voting trust so that it may have the legal title to the stock and exercise the voting rights incident to such title."

On page 43 the Commission also says:

> "We find that modification of our order of June 5, 1945 [Ex. 8], so as to permit the Chesapeake & Ohio Railway Company to acquire legal title to and exercise full voting rights in, 400,000 shares of stock of the New York Central Railroad Company and to permit Robert R. Young and Robert J. Bowman to serve as directors of the New York Central while retaining

> their present position with the Chesapeake & Ohio would be tantamount to sanctioning a violation of section 5(4) of the Interstate Commerce Act and possibly section 7 of the Clayton Act."

It is clearly indicated that the Commission regarded the deposit of stock under Exhibits 8 and 9 as a transfer of ownership of the stock to the Chase Bank, as trustee, and as separating the depositor of the stock from "control" as comprehended by the Interstate Commerce Act, Section 5(4). The Commission held that the transfer to the trustee avoided a violation of Section 5(4). If the deposit of New York Central stock with the trustee had been regarded by the Commission as a "future acquisition" of control by Alleghany without approval in violation of the Act, the Commission could not have decided as it did. Furthermore the New York Central Railroad is an "unnamed" railroad which was not considered or discussed at the time Exhibits 8 and 9 were created.

There had been no specific approval by the Commission of the purchase or deposit of the New York Central stock under Exhibits 8 and 9 prior to trusteeing it. Reports of stock deposited were made quarterly to the Commission (1295, 3134) which learned in this way what was purchased and deposited. Exhibit 17 (3184) summarizes the reports for a time. In *Pere Marquette Railway Company Merger,* 267 I. C. C. 207, where the Commission passed upon the meaning of Exhibits 8 and 9, the Commission stated in a footnote (p. 252) that Alleghany

> "has reported to us, since the hearing herein that it had purchased 225,400 shares of the common stock of the New York Central Railroad Company; and that it had deposited 162,500 shares, and was about to deposit the remaining 62,900 shares, under the indenture * * * ; and later, that it had sold voting-trust certificates for 250,400 shares of this stock to the Chesapeake & Ohio."

In *Matter of Pere Marquette Railway Company Merger*, 267 I. C. C. 207, an independent director of Missouri Pacific Railway sought to compel Alleghany to deposit under Exhibits 8 and 9 the stock of Missouri Pacific owned by Alleghany amounting to 33.81% of the common stock (p. 252). In such proceeding Alleghany conceded that on consummation of the plan of reorganization then under consideration Alleghany should deposit the stock of the new company under Exhibits 8 and 9.

The Commission stated (p. 253):

> "The effect of the order in *Chesapeake & O. Ry. Co. Purchase, supra*, is to require the trusteeing of stock of the Missouri Pacific or any successor corporation that the Alleghany may receive in the reorganization of that company. In addition, the Alleghany has committed itself in this proceeding to deposit under the trust agreement any such stock so received by it. The trust agreement with the Chase National Bank, in that proceeding, *contemplates the further depositing of stock such as that here considered.*" (Emphasis supplied.)

Deposits under the trust agreement, under several rulings of the Commission, clearly deprived Alleghany of any control which could be enjoyed by ownership of the power to vote the stock. The public policy as fixed by these rulings is settled law and the Commission rule is not subject to collateral attack. The Commission has plenary power to determine the public interest. 49 U. S. C. A. § 5(11); *U. S. v. Pierce Auto Freight Lines*, 327 U. S. 515, 535-536 (1946); *McLean Trucking Co. v. U. S.*, 321 U. S. 67 (1944). After the deposit with the trustee of stock of another carrier in any amount Alleghany would only have control of the Chesapeake & Ohio and its affiliated companies, because control of the other carrier would be in the independent trustee. In all the above cases before the Commission it clearly has *determined* that the deposit of controlling stock with the trustee gives voting power to the trustee and no control to Alleghany.

We submit that the Commission also said exactly this in *Chesapeake & Ohio Railway Company Purchase*, 281 I. C. C. 229, as follows:

> "The affidavit of Young, which includes as an exhibit proposals signed by Kirby, with other exhibits embodies proposals by Alleghany made with a view to possible disposition of the proceedings in the two dockets 'without further litigation' and in lieu of exceptions to the original proposed report. It is the intention of Alleghany to acquire or dispose of securities of other corporations from time to time, including securities of carriers subject to regulation under the Interstate Commerce Act. It is, however, Alleghany's intention to limit its control of such carriers to the Chesapeake & Ohio and its affiliated carriers so long as such control continues and subject to the right of Alleghany to apply for control of such other carrier or carriers as it may consider to be in the public interest. In line with these policies Alleghany is prepared to accept an order in this proceeding authorizing continuance of its control of the Chesapeake & Ohio and its affiliated carriers, and containing the following conditions which shall be effective only so long as such control continues: (1) That Alleghany shall be subject to such provisions of the act mentioned in section 5(2) thereof as we shall deem appropriate and designate in our order thereunder; (2) that Alleghany and the Chesapeake & Ohio shall deposit their respective holdings of stock of The Pittston Company with the Empire Trust Company of New York as independent voting trustee; and (3) that Alleghany and the Chesapeake & Ohio shall deposit with the Chase National Bank of the city of New York as independent voting trustee all voting stocks of carrier corporations subject to regulation under the Interstate Commerce Act, not at present affiliated with the Chesapeake & Ohio system, whether now owned or hereafter acquired by either of them, except Alleghany's holdings of the stock of the Missouri Pacific Railroad Company which is now in reorganization under section 77 of the Bankruptcy Act, as amended." (p. 241)

* * * * *

(pp. 242-243) "The essence of the proposal is that Alleghany limit its control of carriers subject to regulations under the Interstate Commerce Act to the Chesapeake & Ohio, the Nickel Plate, the Pere Marquette and, subject to the existing voting trust, The Wheeling & Lake Erie Railway, together with other subsidiaries and affiliated carrier corporations already a part of the transportation system known generally as the Chesapeake & Ohio lines. Alleghany does not at present own stock of any carrier corporation outside this system except stocks of the Missouri Pacific Railroad Company. These would not be deposited since they do not represent any voice in the management of the Missouri Pacific properties. The only carrier corporation other than the Missouri Pacific, outside the Chesapeake & Ohio system, controlled by Alleghany is the United States Trucking Corporation (U. S. Trucking), all the outstanding stock of which is owned by Pittston. *By depositing in trust its holdings of Pittston stock, Alleghany would effectively divest itself of control of U. S. Trucking without sacrificing intrinsic values which at present inure to its own stockholders and without depriving minority Pittston stockholders of whatever rights they have incident to the control of U. S. Trucking by Pittston. Under its proposal, Alleghany would be committed to deposit in trust any voting stocks of carrier corporations not at present affiliated with the Chesapeake & Ohio which it may hereafter acquire. It would also be prevented from acquiring indirect control of other carriers, except with the approval of the Commission, through the Chesapeake & Ohio.* The proposed deposit by the Chesapeake & Ohio of its holdings of Pittston stocks and Erie stocks and the proposed agreement of the Chesapeake & Ohio to deposit in trust voting stocks of other carrier corporations outside its own system which it may hereafter acquire *without our authority*, are intended to accomplish this result." (Italics ours.)

Reference has been made by defendant and by the Court to the following quotation from page 261:

"We have given careful consideration to the proposal by Alleghany in its petition filed on April 12,

1945, and heretofore described more in detail, with respect to limiting its control of carriers subject to the act to only the Chesapeake & Ohio and its affiliated companies, unless further authorization be granted by us. We conclude that such restriction of control is desirable and shall impose conditions in this respect."

These conditions imposed by the Commission did not include any requirement that Alleghany have advance approval of the purchase of stock of a carrier for deposit under the trust. Nor did they limit the number of shares in any such purchase. These conditions were that trusts be established for the stock of Pittston Company and for the deposit of stocks acquired in the future by the Chesapeake & Ohio or Alleghany, the right to purchase which was recognized "without our authority" (p. 243).

A further condition imposed had reference to interlocking directorates.

The Commission also required that quarterly reports of the stock deposited with the trustee be made by the depositors (3134) and the Commission retained continuing jurisdiction over the depositors to act at any time with reference to the deed of trust.

By the above quotation the Commission did not mean that Alleghany would have control of a carrier whose stock was deposited with the trustee no matter what the amount of stock deposited and did not mean that Alleghany could not deposit even controlling stock with the trustee without first having the approval of the Commission. Exhibits 8 and 9 were not based on an application by Alleghany for approval of a specific purchase but for approval of the indenture in order that it might cover future purchases.

By the consummation of the contract, Alleghany would not have acquired "control" of Western Pacific within the meaning of the Interstate Commerce Act. While the block to be sold was large enough to give to its legal-title holder practical working control, amply justifying a decree for specific performance, the actual transfer of the common

stock would not have made Alleghany the "legal-title holder" and would have given it no "control" whatever within the meaning of the statute. The transfer would have been to the Chase Bank, an independent trustee, under the indenture existing between the Chase Bank and Alleghany, as specifically approved by the I. C. C. itself in *C. & O. Railway Co. Purchase,* 261 I. C. C. 239. The transfer would have been either by James direct to the Chase Bank, Trustee, or by a transfer by James to Alleghany accompanied by a *simultaneous* transfer by Alleghany to the Chase Bank, Trustee. By either process, Alleghany would never acquire the "control" of Western that would require the specific approval of the I. C. C. That "control" would have passed directly to the Chase Bank. What Alleghany would acquire would be the beneficial ownership as an investor—the interest of a *cestui que trust.* Alleghany did not contemplate acquiring, and the contract to sell did not provide that it should acquire, the "control" of Western Pacific without a new application to the I. C. C.

The Court was quite correct in holding that a contract will not be enforced if its performance will be an illegal act. But in the present case the performance would have been lawful. If a contract is capable of a lawful performance by one method, the fact that another method would have been unlawful does not invalidate the contract. The presumption is that the lawful method was intended; and on that basis the contract will be enforced.

It is matter of course that the I. C. C. in its order in 261 I. C. C. 239 did not give an "advance benediction of all Alleghany's future acquisitions of control." Obviously it could not without appropriate hearing approve in advance any "acquisition of control" by any carrier. But it did determine that purchases deposited under the indenture between Alleghany and the Chase Bank, even though they involved a block of stock that might give to its legal-title holder practical "control" would not violate Section 5(4) by giving Alleghany control of another carrier. By such a purchase,

Alleghany would not acquire that "control"; it would become merely a beneficial investor. If it should desire to acquire actual voting control, a subsequent application to the I. C. C. would be necessary.

Conclusion.

For the reasons stated above, petitioners request that a rehearing be granted and that on such rehearing the judgment of this court be reversed, and the judgment of the United States District Court be reversed and judgment entered in favor of petitioners, with a new trial ordered on the question of damages only.

Dated, June 23, 1954.

Respectfully submitted,

WHITE & CASE,
Attorneys for Appellants.

ARTHUR L. CORBIN,
ROBERT J. BULKLEY,
J. ADAM MURPHY,
MELVIN L. MILLIGAN II,
Of Counsel.

Certificate.

Alleghany Corporation, Investors Syndicate of America, Inc. and Investors Diversified Services, Inc., Appellants herein, by their attorneys, hereby certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Dated, June 23, 1954.

WHITE & CASE,

By ORISON S. MARDEN,
A Partner,
Attorneys for Appellants.

NOV 26 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC. and INVESTORS DIVERSIFIED SERVICES, INC.,
Petitioners,
against
JAMES FOUNDATION OF NEW YORK, INC.,
Respondent.

No. 430

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

A. DONALD MACKINNON
15 Broad Street
New York 5, N. Y.
Attorney for Respondent James Foundation of New York, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC. and INVESTORS DIVERSIFIED SERVICES, INC., *Petitioners,* *against* JAMES FOUNDATION OF NEW YORK, INC., *Respondent.*	No. 430

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Questions Presented

The questions presented by the petition may be summarized as follows:

1. Whether the Court of Appeals correctly interpreted the voting trust agreement and Interstate Commerce Commission decision as not authorizing Alleghany, without prior Commission approval, to purchase and trustee controlling stock of any number of carriers;

2. Whether the Court of Appeals properly held that the District Court's finding of Alleghany's purpose to acquire control of Western Pacific was warranted and necessarily rejected contrary testimony.

The questions raised are not substantial. The decision of the Court of Appeals turned on its interpretation of a particular instrument and I. C. C. decision, and also on a

narrow issue of disputed fact. It encroaches neither upon the functions of the I. C. C. nor of the District Court. It affects only the litigants and has no general application.

The decision was also correct for the additional reason, not passed upon by the Court of Appeals, that no contract for the sale of the stock was made, as the District Court held.

Statement

The action sought specific performance or damages for breach of alleged contracts for the sale to petitioners of respondent's entire holdings of stock (153,165 shares of common and 55,727 shares of preferred) of The Western Pacific Railroad Company. The final (third amended) complaint alleged that the contracts were made on either of two different dates, at either of two different prices, and that they required delivery of all the common stock to Alleghany, against payment, on the third business day thereafter (R. 49-55).

The claim for specific performance was based on allegations that respondent's common and preferred stock, both having voting rights, together constituted approximately 28.7% of the entire voting stock; that the common stock was approximately 21.5% of the entire voting stock and "could afford to its owner practical control"; and that Alleghany purchased the common because of "the qualities of control which it possessed" and acquired assignments of the alleged contracts to purchase the preferred in order "to increase said voting power" (R. 52-53).

Respondent's answer denied the making of the alleged contracts and pleaded as affirmative defenses the statute of frauds and Alleghany's failure to obtain prior approval by the I. C. C. as required by Section 5 of the Interstate Commerce Act (R. 65-66).

After trial without a jury in which respondent rested on petitioners' case (R. 1026-27), the District Court (Ryan J.) concluded that the persons with whom petitioners deal

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had no authority to bind respondent, and accordingly held that respondent had made no contracts with petitioners (R. 30-31). It was thus unnecessary for the District Court in its opinion (R. 6-40, reported at 115 F. Supp. 282) to pass on the affirmative defenses. The District Court gave judgment for respondent with costs and disbursements (R. 4-5, 40).

In its opinion (appendix* pp. 1100-08, reported at 214 F. 2d 446) the Court of Appeals (Chase, Frank and Hincks, JJ.) assumed, *arguendo*, that the alleged contracts had been made and did not violate the statute of frauds. It nevertheless unanimously affirmed the judgment, holding that Alleghany, since it already controlled the Chesapeake & Ohio Railroad, could not lawfully acquire control of Western Pacific without first obtaining approval of the I. C. C. as required by Section 5, and that "Alleghany could not lawfully have become owner of the stock within the required period and therefore would have been unable to perform the contract with the James Foundation." (appendix p. 1105). It also held, contrary to petitioners' contention, that the Commission's decision in *In re Chesapeake & Ohio Railway Company Purchase Etc.*, 261 I. C. C. 239 "did not give advance approval of any future purchase by Alleghany of the controlling stock of any railroad, provided only Alleghany deposited the stock with the Chase National Bank under the trust agreement * * *" (appendix p. 1107).

Petitioners applied for rehearing on two grounds, one of law and the other of fact. They contended that the Court of Appeals had misconstrued the Commission's decision and the voting trust agreement therein approved (appendix p. 1114). They further contended that "Alleghany planned immediately on purchase to deposit the stock under the trust deed" (appendix p. 1113).

The Court of Appeals requested respondent to answer the petition for rehearing and propounded four questions

* The appendix to the certified record is herein referred to as "appendix."

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to both petitioners and respondent.* The first question was whether an inference that Alleghany intended to deposit the stock under the voting trust agreement was consistent with the allegations of the amended complaint, the testimony of Young, and the District Court's finding that Alleghany's purpose "was to acquire control of Western." The second question was whether, since Alleghany represented that it was not purchasing with a view to distribution, the inference was justified that Alleghany could realize the value of control only by itself exercising that control. The remaining questions dealt with I. C. C. decisions, specific performance, and damages.

The Court of Appeals denied the petition for rehearing in an opinion (appendix pp. 1169-80, reported at 214 F. 2d 451) which fully reviewed the I. C. C. decisions relied on by petitioners. The Court adhered to its original holding that "'Section 5 of the Interstate Commerce Act precludes the entry of any blanket Commission order approving further control acquisitions of any unnamed railroad whatsoever'" and observed that "Only the most unequivocal statement by the Commission would induce us to believe that it had entered such a blanket order." (appendix p. 1174). While stating that this determination disposed of the petition, the Court also considered the issue of Alleghany's intent. Noting that that issue was raised by the pleadings and the evidence, the Court held the District Court's finding that Alleghany's purpose "was to acquire control" amply supported by the evidence, and with respect to testimony of an intent to trustee the stock said: "We think the trial judge could properly refuse (as he obviously did) to credit the oral testimony on the subject, introduced by Alleghany, of witnesses he saw and heard." (appendix pp. 1174-78).

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* The Court's questions are not included in the appendix to the certified record but are printed at pp. 22-23 of the appendix to the petition for certiorari.

ARGUMENT

I

The Court of Appeals properly interpreted the voting trust agreement and the I. C. C. decision.

Petitioners apparently assume that because the I. C. C. is charged with enforcement of the Interstate Commerce Act, any conflict between its interpretation of Section 5 and the interpretation thereof by a Court of Appeals would warrant review by this Court. But it is well settled that the I. C. C.'s interpretations of the Act it administers, although entitled to weight, are not binding on the courts. *Railway Labor Ass'n* v. *U. S.*, 339 U. S. 142, 154 (1950); *I. C. C.* v. *Railway Labor Ass'n*, 315 U. S. 373, 380 (1942), *Texas and Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 640 (1933).

In any event, the asserted conflict with the I. C. C. does not exist.

Basic to petitioners' contention that conflict exists is their statement that the Court of Appeals held that "a deposit of stock in a voting trust approved by the Interstate Commerce Commission does not prevent the beneficial owner from acquiring control of a carrier." (petition pp. 2, 11). What the Court actually held was that the deposit by Alleghany with the voting trustee of controlling shares of any un-named railroads was not authorized by the voting trust agreement or by the I. C. C. decision approving that agreement (appendix pp. 1174, 1179-80).

This holding was made in response to Alleghany's contention that the trust agreement and I. C. C. decision permitted it to purchase and trustee controlling shares of Western Pacific. The only source of the authority asserted by Alleghany is the provision in the trust agreement that Alleghany will trustee "all voting stocks of carriers * * * which it may hereafter acquire" other than stocks of Chesapeake & Ohio affiliates. (Pl. Ex. 9; R. 430, 1048). The argument assumed that "all voting stocks" included controlling blocks. Thus it was Alleghany's position that the I. C. C. had authorized it to purchase and trustee control-

ling blocks of as many carriers as it desired, and the Court of Appeals properly so described Alleghany's position (appendix pp. 1169-70).

The rejection of this contention was plainly required by the terms of the I. C. C. decisions cited to the Court of Appeals by petitioners, including 261 I. C. C. 239, the only one on which they now rely. In addition to the Court's careful analysis of those decisions (appendix pp. 1170-74, 1179-80), other considerations demonstrate the correctness of the Court's refusal to hold that the very instrument which restricted Alleghany to control of the Chesapeake & Ohio system carried within it a license for Alleghany to acquire and trustee controlling stock of any number of un-named railroads without further leave of the I. C. C.

The trust agreement provided that Alleghany would trustee all voting stocks of carriers except those of the Chesapeake & Ohio system which it might thereafter acquire "unless acquisition thereof is expressly approved by the Commission * * *." (Pl. Ex. 9; R. 430, 1040). The only carrier stock whose acquisition requires I. C. C. approval is controlling stock (49 U. S. C. § 5). Controlling stock was thus excepted from the scope of the trust agreement. The exception was clearly intended to reserve all questions relating to the acquisition of controlling stock of other carriers for proceedings under Section 5(2), in accordance with Alleghany's express assurances to the Commission that it intended to limit its control of carriers to the Chesapeake & Ohio and affiliates "subject to the right of Alleghany to apply for control of such other carrier or carriers as it may consider to be in the public interest." (261 I. C. C. 239, 241).

If petitioners' views of Alleghany's authority were correct, illegal acquisitions of control and violations of the Act by the voting trustee would result. The prohibition against acquisition of control of more than one carrier without I. C. C. approval extends to "any person" (49 U. S. C. § 5(4)). It was just as illegal for the voting trustee as for Alleghany to acquire such control without I. C. C. approval.

The Commission did not authorize future control by the voting trustee of two or more carriers because it lacked power to do so. Section 5 requires that approval of any acquisition of control within the specified categories shall be given by the Commission only after notice to interested parties, a hearing, and a finding that the proposed acquisition will be in the public interest. The statute thus precludes any blanket, advance approval of acquisitions of control of un-named carriers, having unknown effects upon the public interest.

II

The Court of Appeals properly held that the District Court's finding of Alleghany's purpose was unwarranted by the evidence and was a rejection of contrary testimony.

Petitioners claim that in rejecting their contention on rehearing that Alleghany intended to trustee the stock the Court of Appeals either (a) improperly made a finding of fact as to the intent of witnesses, Young and Purcell, not made by the District Court and contrary to the witnesses' uncontradicted testimony (petition p. 2); or (b) "unreasonably described" the District Court's finding, which they assume was correct (petition p. 6), that the purpose of Alleghany "was to acquire control" (petition pp. 7, 8, 13).

The Court of Appeals did neither. What it did was review the evidence and hold the District Court's finding amply supported. It thus rejected an assertion of fact inconsistent with the finding, which the District Court necessarily had rejected in making that finding.

The question of Alleghany's intent was not, contrary to petitioners' assertion (petition pp. 7-8), raised for the first time by the Court of Appeals itself on rehearing. Evidence on the point was adduced at the trial and passed on by the District Court.

The evidence included the interested, post factum testimony of Young and Purcell to the effect that during their negotiations they had expressed to each other intentions

of trusteeing the stock (R. 339, 402-03). This is the sole evidence to which petitioners point in support of their contention (petition p. 9). That self-serving testimony was contradicted by Young's own admissions that Alleghany was "buying control" (R. 259-60, 309), and by other testimony as to Alleghany's arrangements to deposit the Western Pacific common stock, not voting trust certificates, as collateral under bank loans (R. 399, 402, 467-68, 513-14, 701-02, 708). It was also contradicted by contemporaneous writings, including a resolution of Alleghany's executive committee authorizing the purported purchase (Pl. Ex. 6, not printed), the purported contract of sale signed by Alleghany (Pl. Ex. 52; R. 664, 1069-71), and the letter of Alleghany's attorneys, authorized by Young, demanding delivery of the shares (Pl. Ex. 50; R. 632, 1066-68). All these documents, made at the time, are significantly silent as to trusteeing. The evidence on this point is accurately summarized in the opinion of the Court of Appeals (appendix pp. 1174-78) and need not here be repeated.

On all the evidence the District Court found—a material finding on the issues tried—that "The purpose of Alleghany in offering to purchase the James Western common stock was to acquire control of Western * * *" (F. 58, R. 29). The Court of Appeals held this finding amply supported by the evidence (appendix p. 1105). Petitioners concede it was correct (petition p. 8).

The District Court's finding necessarily meant that it rejected the testimony of Young and Purcell as to intent to trustee the stock. It was not required to make an express finding rejecting their testimony or credibility. See *Kelley* v. *Everglades Drainage District*, 319 U. S. 415, 422 (1943). Had it accepted their testimony it could not have found that Alleghany's purpose was to acquire control. An intent to trustee and a purpose to control were mutually exclusive.

As the Court of Appeals pointed out, it was the District Court which refused to credit the oral testimony of Young

and Purcell as against substantial evidence to the contrary (appendix p. 1178). In this there was plainly no violation of Rule 52. As this Court said in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 396 (1948), where oral testimony as to intent "is in conflict with contemporaneous documents we can give it little weight • • •".

CONCLUSION

The questions raised by the petition are without merit. The petition lacks substantial grounds and should be denied.

Respectfully submitted,

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